

18-1597-cv

*Ragbir et al. v. Homan et al.*

1 John M. Walker, Jr., Circuit Judge, dissenting:

2       Although I agree with much of the reasoning in the majority  
3 opinion, because I would not remand the case for further proceedings  
4 or reach the issue of whether Ragbir's claim fits within the  
5 "outrageous" exception to § 1252(g)'s withdrawal of jurisdiction that  
6 was articulated by the Supreme Court in *Reno v. American-Arab Anti-*  
7 *Discrimination Committee*, 525 U.S. 471, 488–92 (1999) [hereinafter  
8 "*AADC*"], I respectfully dissent.

9       In my view, remand is not warranted because the  
10 Government's retaliation against Ragbir has ended and its taint has  
11 dissipated. Ragbir plausibly alleged that the Government's  
12 retaliation occurred on January 11, 2018 and included terminating his  
13 third administrative stay early, arresting him on the spot without  
14 prior notice, and attempting to immediately deport him by  
15 transporting him from New York City to Florida and incarcerating  
16 him there. But the taint of any retaliation ended no later than January  
17 29, 2018, more than a year ago, when Ragbir was released from  
18 custody following the district court's grant of his habeas corpus  
19 petition. Importantly, that grant was ordered not so Ragbir could  
20 remain in the United States, but to allow him "an orderly departure"  
21 and "the freedom to say goodbye." *Ragbir v. Sessions*, No. 18-CV-236  
22 (KBF), 2018 WL 623557, at \*3 (S.D.N.Y. Jan. 29, 2018). Benefiting from  
23 litigation-prompted stays, Ragbir has yet to be removed.

1 Ragbir, in this proceeding, has never taken issue with the fact  
2 that he is subject to a valid removal order entered in March 2007 as a  
3 result of his felony conviction for wire fraud. Nor does he dispute  
4 that no stay prevents his removal other than the one entered by this  
5 court in this appeal. It is the stated policy of the current executive  
6 branch to “prioritize for removal . . . removable aliens who [h]ave  
7 been convicted of any criminal offense.” Exec. Order. No. 13,768, 82  
8 Fed. Reg. 8,799, 8800 (Jan. 25, 2017). *See also* U.S. DEPARTMENT OF  
9 HOMELAND SECURITY, ENFORCEMENT OF THE IMMIGRATION LAWS TO  
10 SERVE THE NATIONAL INTEREST (2017), at 3 (“criminal aliens are a  
11 priority for removal”).<sup>1</sup> Although this has also been the stated policy  
12 of past administrations, enforcement practices on the ground can  
13 differ from administration to administration. One would have to be  
14 blind not to notice that the change of administration in January 2017  
15 has brought with it an unrelenting focus on deporting convicted  
16 felons, such as Ragbir. *See* U.S. IMMIGRATION AND CUSTOMS  
17 ENFORCEMENT, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL  
18 OPERATIONS REPORT, at 14 (In fiscal year 2018, ICE “conducted 256,085  
19 removals – the highest level since FY2014” and prioritized “public

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<sup>1</sup> We may take judicial notice of written materials “[w]hen there is no dispute as to the authenticity of such materials and judicial notice is limited to law, legislative facts, or factual matters that are incontrovertible, such notice is admissible.” *Oneida Indian Nation of New York v. State of N.Y.*, 691 F.2d 1070, 1086 (2d Cir. 1982).

1 safety threats and immigration violators, as reflected by the fact that,  
2 like in FY2017, 9 out of 10 [ICE] administrative arrests had either a  
3 criminal conviction(s), pending charge(s), were an ICE fugitive, or  
4 illegally reentered the country after previously being removed.”).<sup>2</sup>

5 For the above reasons, I disagree with the majority’s contention  
6 that the consequences of the Government’s retaliation continue  
7 because, but for the retaliation, Ragbir would plausibly have obtained  
8 a further extension of his administrative stay from an administration  
9 that has steadfastly sought to deport him, much less another two-year  
10 extension. Under these circumstances, I see no reason for this case to  
11 continue in the district court, further impeding Ragbir’s removal.<sup>3</sup>

12 I also have reservations about the majority’s discussion of  
13 AADC’s “outrageous” exception to the § 1252(g) removal of  
14 jurisdiction. As a preliminary matter, I fail to see the necessity of

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<sup>2</sup> The Government has also represented to this court in a related case that “Ragbir has been issued a so-called ‘bag and baggage’ letter notifying him that he is to report to ICE for removal. (Dist. Ct. ECF No. 49). Thus, at this point it has been made abundantly clear to him that, once any judicial impediment to his removal has been lifted, it is substantially likely that the government will promptly effectuate his removal.” Reply Memorandum for Respondents-Appellants at 5, *Ragbir v. Sessions* (2d Cir.) (No. 18-1595).

<sup>3</sup> Any concern by the majority that Ragbir’s prompt removal now would somehow revive the previous retaliation of more than a year ago could presumably be addressed by the recusal of the officer who made the decisions in January 2018. This would enable a previously uninvolved officer to independently decide whether to enforce the March 2007 order of removal without regard to the circumstances that are alleged to have prompted the Government’s actions in January 2018.

1 addressing this issue at all given the majority's conclusion that Ragbir  
2 is entitled to a habeas corpus proceeding under the Suspension  
3 Clause despite § 1252(g)'s withdrawal of jurisdiction. That he is  
4 permitted to bring a habeas proceeding would allow us to consider  
5 Ragbir's case regardless of whether the Government's conduct falls  
6 within the "outrageous" exception contemplated by *AADC*. As I read  
7 *AADC*, that exception was predicated on the assumption that habeas  
8 relief was not available or would come too late, *AADC*, 525 U.S. at  
9 487–88, indicating that it is unnecessary to undertake this analysis if  
10 timely habeas relief *is* available.

11 Second, despite the majority's statement that it is not  
12 "delineat[ing] the boundaries of what constitutes an 'outrageous'  
13 claim within the meaning of *AADC*," it creates from whole cloth a  
14 five-factor balancing test to determine whether the Government's  
15 conduct was "outrageous." I am concerned that, because this test will  
16 be the standard by which future claims are evaluated, it will become  
17 an open door for evading the will of Congress in enacting § 1252(g).  
18 Considering only the "Government's discretionary prerogative"  
19 gives short shrift to the Government's significant enforcement  
20 interests and does not provide a framework for adequately  
21 considering the Government's actions in context.

22 Turning to the facts of this case, although the majority opinion  
23 acknowledges that Ragbir is a criminal alien subject to a valid removal

1 order, it quickly discounts this fact by arguing that Ragbir has no duty  
2 to leave the country on his own, unlike an alien who unlawfully  
3 enters and therefore is engaged in a continuing violation of law. To  
4 my mind, however, the Government's interest in removing a criminal  
5 alien, heightened when the executive branch has a stated policy of  
6 prioritizing the removal of criminal aliens, is at least as strong as the  
7 Government's interest in "bring[ing] to an end an ongoing violation  
8 of United States law" by one who has simply overstayed his visa.  
9 *AADC*, 525 U.S. at 491 (emphasis omitted).

10 Finally, although I agree that the complaint sufficiently alleged  
11 that the Government acted improperly when it shortened Ragbir's  
12 administrative stay, arrested him, and held him in custody in  
13 preparation for his departure, there was nothing inherently unlawful  
14 in these acts which, absent improper motive, are fully authorized  
15 when enforcing an alien's removal. I can easily imagine much more  
16 "outrageous" acts of government impropriety, such as the deliberate  
17 and unjustified use of grossly excessive force or vindictive placement  
18 in solitary confinement. Therefore, I am not at all convinced that the  
19 Government's actions against Ragbir were "outrageous" under the  
20 circumstances.

21 For these reasons, I respectfully dissent.